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No. 126

In the Supreme Court of the United States

OCTOBER TERM, 1944

CHARLES E. MERRILL, PETITIONER

v.

JOHN L. FAHS, UNITED STATES COLLECTOR OF INTERNAL REVENUE FOR THE DISTRICT OF FLORIDA

WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE RESPONDENT

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OPINIONS BELOW

The opinion of the District Court for the Southern District of Florida (R. 52–57) is reported in 51 F. Supp. 120. The opinion of the Circuit Court of Appeals (R. 67–77) is reported in 142 F. 2d 651.

JURISDICTION

The judgment of the Circuit Court of Appeals, reversing the District Court, was entered on May 3, 1944 (R. 78). Petition for a writ of certiorari was filed on June 3, 1944, and granted October 9, 1944 (R. 80). Jurisdiction of this Court is invoked

under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTION PRESENTED

Whether, within the meaning of Sections 501 and 503 of the Revenue Act of 1932 and the applicable Treasury Regulations, the transfer by taxpayer in trust for his prospective wife was taxable as a gift, to the full extent of the $300,000 transferred, notwithstanding that it was made pursuant to an antenuptial agreement providing for a release of her statutory dower rights.

STATUTES AND REGULATIONS INVOLVED

The statutes and regulations involved may be found in the Appendix, *infra*, pp. 52–54.

STATEMENT

In this action taxpayer sued the defendant collector for recovery of a gift tax in the amount of $99,000 plus interest, alleged to have been erroneously and illegally assessed and collected (Complaint, R. 1–3). The issues were tried by the court without a jury. The findings of fact were based upon the parties' stipulation (R. 5–42) and certain documentary exhibits introduced by taxpayer (R. 42A–45).

The taxable year involved is 1939 (R. 45). During that year taxpayer was a citizen of Florida, but when he began this suit, he had become a citizen of New York (R. 45, 69). On March 8,

1939, taxpayer was married to Kinta Desmare in Florida (R. 45), likewise then domiciled in Florida (R. 69). On that date he was fifty-three years old and Miss Desmare was thirty-five years old (R. 45). Taxpayer had been married on two previous occasions and twice divorced. At the time of his third marriage, he had three children and two grandchildren, all of whom were then living (R. 45–46). Miss Desmare had never theretofore been married (R. 45). At the time of the marriage and of the trial, both parties were in good health (R. 46). At all times involved, taxpayer was possessed of considerable wealth. His net worth was in excess of $5,300,000, consisting of cash, stocks, bonds and similar securities. In addition, he owned a home in Palm Beach, Florida, valued at $100,000, and other real estate valued at $35,000. (R. 49.) At the time of their marriage, Miss Desmare, on the other hand, was without worldly goods. The parties stipulated and the court found that "her net worth" was "negligible" (R. 6, 46).

Shortly before his marriage to Miss Desmare, taxpayer had defended a divorce proceeding in which heavy money demands had been made upon him by his second wife (R. 46). Before making any definite matrimonial arrangement with Miss Desmare, taxpayer consulted his attorney with reference to the Florida dower statute and the feasibility of an antenuptial agreement to adjust

property rights between them; subsequently he informed her of his previous marital affairs, advised her of his financial condition and his desire to provide for his family by the previous marriages, as well as the nature of his business and his wish to enter into an antenuptial agreement with her (R. 46). On March 7, 1939, the day before the wedding, they executed a written agreement in Florida (R. 46). It is prefaced by recitals stating at length (R. 46) their reasons and motives for making it (R. 10–12). In summary, these are: the contemplated marriage; the desire of taxpayer to make fair provision for her in "full settlement", "satisfaction", "substitution" and "lieu" of all rights which, upon marriage, she would "otherwise have or become entitled to as wife, widow or otherwise" in the property which he then owned or might thereafter own or in his estate upon his death; and her desire to have such provision made for her as a substitute for all of these rights "to which she may hereafter become entitled, as wife or widow." It is further recited that taxpayer has children by both his previous marriages, and that the parties deem it proper that he be free at all times to make such definite provision for their welfare, by will or otherwise, as he may think best; that without this agreement he would be greatly hindered by dower and other laws from making an equitable distribution of a fair proportion of his estate among his children

and among the children of their contemplated marriage and among other dependents "whom he feels to be justly entitled to receive of his bounty"; that while his net worth then was very substantial, the nature of his business, including stock market operations, subjected him to the risk at any time of heavy losses, and thus the possibility of changing conditions and financial reverses impelled him to guard against any unfortunate consequences which his contemplated marriage and the uncertainties of the future might have upon his will and estate; that the agreement would tend to promote marital tranquility; that Miss Desmare desired to receive the trust settlement provided by the agreement in order to be assured of a means of support for herself and for the children of their contemplated marriage in the event of his death; that he had made full disclosure of his financial situation to her; that she had been advised by her counsel with reference to the import of the agreement; and that both parties were of the opinion that the considerations agreed to be provided by him are the fair and adequate equivalent of the rights agreed to be relinquished and surrendered by her. The agreement was stated to be made in consideration "of the premises and of the solemnization of the aforesaid intended marriage" and of the sum of one dollar paid by taxpayer to her. (R. 12.)

Thereupon, for her part, it was agreed (R. 12):

> The said Kinta Desmare, party of the second part, has granted, remised, released, relinquished, conveyed and forever quit-claimed and by these presents does grant, remise, release, relinquish, convey and forever quit-claim unto the said Charles E. Merrill, party of the first part, his heirs, personal representatives and assigns:
>
> (a) All of the right, title and interest which she may acquire as wife or widow of the first party in all of the lands, tenements and hereditaments of which the first party may be seized at the time of the marriage of the parties or at any time thereafter.
>
> (b) All of the right, title and interest which she may acquire as the wife or widow of the first party in and to any and all personal property, tangible or intangible, which the first party may own at the time of the marriage or at any time thereafter.
>
> This conveyance includes all properties, wheresoever situated, and every right pertaining thereto whether of dower, election, participation, inheritance or other title or allowance. Second party hereby waives, discharges and releases every interest, claim or demand of whatsoever kind or description, in law or in equity, that may accrue to her or which she may hereafter acquire as wife or widow, in the real and personal property now or hereafter owned

by the first party; so that neither the second party nor her heirs, executors, administrators or assigns, or any of them, shall have or be entitled to assert any right, claim or demand whatsoever against any of the properties or estate of the first party but shall be forever barred and excluded therefrom.

* * *

For his part, taxpayer agreed (R. 13):

(a) That within ninety days from the date of said marriage, he will create an irrevocable trust, of $300,000.00 in cash or securities of equivalent value, the provisions of which shall conform to the wishes heretofore expressed by the said Kinta Desmare, that is to say the trust indenture shall provide for the said Kinta Desmare to receive during and throughout her lifetime the net annual income from said trust funds, such income to be paid her quarterly; * * *.

Upon her death, if she is survived by her mother, the income from the trust is to be paid to her mother for life; then upon the death of the survivor, the principal is to be paid to living children of the marriage, in default of these, to living grandchildren of taxpayer, and in default of these, to taxpayer's children by his former marriages (R. 13–14). Two additional trusts to be incorporated in his will were also provided—the first, likewise in the principal amount of $300,000, to contain the same limitations as the *inter vivos*

trust above described; the second, also in the principal sum of $300,000, for the benefit of surviving children by the proposed marriage, and in default of such, to taxpayer's children by his previous marriages (R. 14–15). However, with respect to these two proposed testamentary trusts, it was agreed that if his estate at the time of his death be diminished by losses (other than gifts) to less than $2,000,000, the testamentary trusts shall each be limited to fifteen percent of the value of his net estate (R. 15–16).

Express provision was made that (R. 16):

> Nothing herein contained is intended to deprive the said Kinta Desmare of the right to receive during coverture from the said Charles E. Merrill proper maintenance and support for herself and for any children that may be born to her by him.

It was stipulated that the contract should be construed in accordance with the laws of Florida, and that should the agreement, for any reason, be declared ineffectual to transfer to him the property rights belonging to her which it purported to release, then upon his death, any consideration given to her under the agreement should be deducted from her portion of his estate (R. 16).

Within the ninety-day period specified in this antenuptial agreement, namely, on May 29, 1939, taxpayer created an irrevocable trust to which he transferred $300,000 in cash and in which he named himself as trustee. The limitations of the

trust instrument follow the provisions of the antenuptial agreement. (Ex. B, R. 16–23.) The money was deposited with the Commercial Trust Company of New Jersey to the credit of an account entitled (R. 7):

> Charles E. Merrill, as Trustee under deed of trust dated May 29th, 1939, made by Charles E. Merrill in the amount of $300,000.00.

On the same date, the taxpayer also executed his will containing clauses likewise designed to carry out the provisions of the antenuptial agreement (R. 7). Prior to their execution, the former Miss Desmare's attorney approved these instruments as conforming with the antenuptial agreement (R. 48–49). It was stipulated (R. 7) and found by the District Court that the transactions between taxpayer and Miss Desmare were in good faith (R. 49).

Under the Florida statutes in effect on the date of the marriage (March 8, 1939), the wife had inchoate dower in the land of her husband amounting to a one-third interest in fee simple of such real property as he owned in Florida at marriage or might acquire during marriage, provided she elected in writing within a limited time after his death to apply for it; she also had dower of one-third of his personal property but limited to that owned by him at his death. Should no lineal descendants of them both survive, but other of his lineal decedents survive, her dower was

limited to a child's part (R. 49);[1] this part, it is undisputed, here amounted to one-fourth. On April 21, 1939, between the date of the marriage and the settlement of the trust, the Florida statute was amended to subject dower to the husband's debts at death and to estate taxes, costs, charges, and expenses of administration (R. 72).[2]

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[1] The dower statute of Florida in force and effect at the date of the antenuptial agreement was as follows:

Laws of Florida (1933), c. 16103:

Section 35 [as amended by Acts of 1935, c. 17171, Sec. 1, and Acts of 1937, c. 18066, Sec. 1]. DOWER IN REALTY AND PERSONALTY. Whenever the widow of any decedent shall not be satisfied with the portion of the estate of her husband to which she is entitled under the law of descent and distribution or under the will of her said husband, or both, she may elect, in the manner hereinafter provided, to take dower, which dower shall be one-third part in fee simple of the real property owned by her husband at the time of his death or which he had before conveyed, whereof she had not relinquished her right of dower as provided by law, and one-third part absolutely of the personal property owned by her husband at the time of his death, which said dower, both real and personal, shall be free from all liability for the debts of the decedent, all estate and inheritance taxes and all costs, charges and expenses of administration, provided, however, that if a decedent be survived by his widow, and lineal descendants and that none of such lineal descendants are also the lineal descendants of such widow, then the dower shall be limited to the portion of the estate of the decedent to which the widow is entitled under the law of descent and distribution, to-wit, a child's part, which said dower shall also be free from all liability for the debts of the decedent, all estate and inheritance taxes and all costs, charges and expenses of administration; * * *.

[2] Laws of Florida (1939), c. 18999, p. 16.

The parties stipulated (R. 8–9) and the District Court found (R. 9, 50), "if it is possible to place a money value upon the wife's dower interest under the facts in this case" that (R. 49–50):

> The reversionary interest of a person age thirty-five in a fund becoming payable upon the death of a person age fifty-three, per $1.00 of the fund is .422604;

and that this factor was established by calculations based upon the Actuaries or Combined Experience Table of Mortality with interest at 4% (R. 49–50).

In a gift tax return for 1939, taxpayer reported creation of the irrevocable trust and the transfer of $300,000 to it, asserting, however, that no tax was due (R. 24 A). A rider attached to the return contained the following statement (R. 50):

> This trust was created pursuant to an ante-nuptial agreement executed March 7, 1939 between the taxpayer and his wife, wherein, in consideration of the solemnization of the marriage and Mrs. Merrill's promise to release and relinquish her inchoate dower and other marital rights in his property, the taxpayer agreed to create this trust for the benefit of his wife, her mother, and the remaindermen designated by Mrs. Merrill in said agreement. * * *
>
> In view of the net worth of the taxpayer and the value of the real estate and other property owned by him at the time the trust

> was created and the other circumstances set forth in said ante-nuptial agreement, and in view of the absence of any donative intent on the part of the taxpayer, he has excluded the amount of the transfer to this trust from Schedule A of the Gift Tax Return for 1939 on the ground that the relinquishment by Mrs. Merrill of her inchoate dower and other marital rights in his property constituted a valuable consideration in money or money's worth at least equal to the sum of $300,000, the amount transferred to the trust in question.

Miss Desmare also reported the transaction in a gift tax return for 1939 (R. 42A–43).* On a rider attached to her return she stated (R. 43):

> The taxpayer is advised that she became a purchaser of the corpus of this trust for a consideration commensurate with the amount of said corpus, to-wit, $300,000, and that with respect to the provisions in this trust for the benefit of her mother and the other remaindermen designated therein (after her own life) she, rather than her husband (the grantor of said trust), was the donor of such benefits within the terms of the Gift Tax Law.

Neither taxpayer nor Miss Desmare reported income or profit on the described transactions (R. 50–51). The Commissioner, by letter dated August 27, 1941, determined a deficiency of $99,000 in taxpayer's gift tax return for the calendar year

1939 (R. 51). Taxpayer paid the amount assessed with interest, filed claim for refund, and instituted the present suit upon the Commissioner's rejection of the claim (R. 51).

In the District Court the only issues discussed were whether, as a matter of law, the release by Miss Desmare of her marital property rights could constitute "adequate and full consideration in money or money's worth" to any extent, within the meaning of Section 503 of the Revenue Act of 1932, and if so, what, as a question of fact, was the value of these particular rights (R. 52–58).[2] The opinions in the Circuit Court of Appeals (R. 67–77) discussed the questions as to what, if any, consideration in money or money's worth taxpayer received in the transaction; if any, whether he had sustained the burden of establishing a money value for it; and whether the transaction as a whole was to be deemed a gift within the meaning of the statute. The District Court sustained the taxpayer and entered judgment for the amount claimed with interest (R. 57–58). The Circuit

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[2] In its conclusions of law the District Court thus defined the issues (R. 52):

> Under such circumstances, release of wife's statutory rights may constitute full and adequate consideration, in money or money's worth, for a transfer of property to her by the husband, within the true intent and meaning of Section 503 of the Revenue Act of 1932; whether or not it is such full and adequate consideration is a question of fact.

Court of Appeals reversed and directed judgment in favor of the Collector. Judge Waller dissented. (R. 78.)

SUMMARY OF ARGUMENT

1. The circumstance that the transfer was made pursuant to an enforceable contract at common law does not preclude a taxable gift since the gift tax is not confined to transfers of something for nothing. The statute (Section 503, Revenue Act of 1932) provides that a transfer for less than an adequate and full consideration in money or money's worth shall be deemed a gift to the extent of the amount by which the value of the property transferred exceeds the value of the consideration. Treasury Regulations 79, Article 8, long continued and having the force of law, while excepting transactions made in the ordinary course of business (bona fide, at arm's length, and free from any donative intent) as not within the purview of the statute, contemplate that transactions not arising in the ordinary course of business and without consideration adequate and full in money or money's worth, fall within its terms. In any event, in the instant case, no element of a bargain was involved; the context was not commercial; it was a family settlement and there was no purpose to exact a *quid pro quo*. All that transpired was the distribution of a large estate by taxpayer among the members of his family.

as the antenuptial agreement itself establishes, and the essential quality of the transfer is thus the disposition of property by way of gift.

2. Taxpayer received no consideration reducible to a money value for the gift. The release of marital property rights arising after death is not reducible to a money value. The court below in refusing to value them did not abdicate its function nor avoid a problem of valuation because of complexity; on the contrary, the record establishes that the property attempted to be valued does not now exist except as a vague expectation. The property released cannot be known until the taxpayer's death. Ascertainment of the value of this highly contingent interest would require actuarial tools for calculating the probability that taxpayer during his eighteen or nineteen years life expectancy will not give away his estate, will not lose it, will not subject it to debts, and that the legislature will not substantially curtail or destroy the dower rights. Valuation of such an interest would amount merely to speculation bearing the delusive appearance of accuracy. Moreover, this is an action for refund of taxes; the burden of proof is upon the taxpayer not merely to establish that the determination of the Commissioner was erroneous, but to prove affirmatively the correct amount of the judgment to which he claims to be entitled. This burden he has not and cannot sustain, since the consideration for which he

claims credit, in the nature of things, is not reducible to terms of money. Accordingly, the entire value of the property transferred constitutes the amount of the taxable gift.

3. In any event, as a matter of law, the release of dower or statutory marital rights created in lieu of dower, cannot constitute adequate and full consideration in money or money's worth, within the meaning of Section 503 of the Revenue Act of 1932. This construction is confirmed by the history of the estate and gift tax provisions. The estate tax and the gift tax are in *pari materia* and must be construed together. If consideration is afforded a narrower meaning in the gift tax than in the estate tax laws, the main purpose of the gift tax, namely, to prevent or compensate for avoidance of death taxes, will be frustrated. The standard for consideration in both the gift tax and the estate tax was amended by Congress from "fair consideration" to "adequate and full consideration", with the purpose, among others, of foreclosing the view that release of dower can be consideration to any extent under either tax. Section 804 of the Revenue Act of 1932, expressly excluding relinquishment of dower from the meaning of consideration for estate tax purposes, was merely a clarification of existing law; hence the gift tax provisions should also be construed as excluding dower as consideration. Any other interpretation will lead to a perplexing situa-

tion where under identical definitions of consideration in the estate and gift tax, contradictory results are reached. In any event, the failure to amend the gift tax provision is not decisive of the question, for in line with the policy of integration of the estate and gift taxes, Congress designed the gift tax to be construed with reference to and consistently with the estate tax.

ARGUMENT

THE TAXED TRANSFER WAS A GIFT WITHIN THE MEANING OF SECTIONS 501 AND 503 OF THE REVENUE ACT OF 1932 AND THE REGULATIONS

The terms "transfer" and "gift" are used, in Sections 501 and 503 of the Revenue Act of 1932, in their broadest and most comprehensive sense. H. Rep. No. 708, 72d Cong., 1st Sess., p. 27 (1939–1 Cum. Bull. (Part 2) 457, 476); S. Rep. No. 665, 72d Cong., 1st Sess., p. 39 (1939–1 Cum. Bull. (Part 2) 496, 524); cf. *Smith* v. *Shaughnessy*, 318 U. S. 176; *Robinette* v. *Helvering*, 318 U. S. 184. Thus these gift tax provisions are not confined in their application to transfers of something for nothing, for if receipt of consideration by a transferor avoided a gift, as at common law, a ready means would have been afforded for frustration of the tax. Hence, Congress provided not merely that a tax be imposed "upon the transfer * * * of property by gift" (Section 501, Revenue Act of 1932, *infra*,

p. 52), but further enacted, in Section 503 of that Act, that:[4]

> Where property is transferred for less than an adequate and full consideration in money or money's worth, then the amount by which the value of the property exceeded the value of the consideration shall, for the purpose of the tax imposed by this title, be deemed a gift, and shall be included in computing the amount of gifts made during the calendar year.

The statute plainly contemplates the actuality of a "gift" despite the immediacy of "consideration" of "value"; simultaneously "gift" and "consideration" may coexist; and though the transfer is one "for" the other, nevertheless, "for the purpose of the tax" the excess in value of the property transferred over such consideration is "deemed" a "gift".

Indeed, an analogous problem with respect to deductible claims under the estate tax had previously been dealt with in Section 303 (a) (1)

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[4] A similar but more limited provision was also contained in the Revenue Act of 1924, c. 234, 43 Stat. 253, Section 320, enacting the first gift tax:

> Where property is sold or exchanged for less than a fair consideration in money or money's worth, then the amount by which the fair market value of the property exceeded the consideration received shall, for the purpose of the tax imposed by section 319, be deemed a gift, and shall be included in computing the amount of gifts made during the calendar year.

of the Revenue Act of 1926, c. 27, 44 Stat. 9, by use of the same language. There, Congress had provided that claims against an estate were deductible to the extent that they "were incurred or contracted bona fide and for an adequate and full consideration in money or money's worth". This meant, so this Court held in *Taft* v. *Commissioner*, 304 U. S. 351, 355–356, that although claims might be enforceable under state law as contracted for consideration, it did not follow that they were incurred or contracted for an adequate and full consideration in money or money's worth within the meaning of the statute. So here, the circumstance that the transfer was made pursuant to a valid and enforceable contract at common law does not preclude a taxable gift.

Long standing Treasury Regulations correctly mark out this statutory meaning. Thus, Treasury Regulations 79 explain:

> ART. 1. *Imposition of tax.*— * * * The tax is not limited in its imposition to transfers of property without a valuable consideration, which at common law are treated as gifts, but extends to sales and exchanges for less than an adequate and full consideration in money or money's worth. (See article 8.) * * *
>
> ART. 8. *Transfers for a consideration in money or money's worth.*—Transfers reached by the statute are not confined to those only which, being without a valuable consideration, accord with the common law

> concept of gifts, but embrace as well sales, exchanges, and other dispositions of property for a consideration in money or money's worth to the extent that the value of the property transferred by the donor exceeds the value of the consideration given therefor. However, a sale, exchange, or other transfer of property made in the ordinary course of business (a transaction which is bona fide, at arm's length, and free from any donative intent), will be considered as made for an adequate and full consideration in money or money's worth. A consideration not reducible to a money value, as love and affection, promise of marriage, etc., is to be wholly disregarded, and the entire value of the property transferred constitutes the amount of the gift.

On familiar principles these Treasury Regulations, long continued without substantial change,[5]

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[5] The language of Article 8 of Treasury Regulations 79, in the 1933 edition, was substantially the same as in the 1936 edition. It then read as follows:

> ART. 8. *Transfers for less than an adequate and full consideration.*—Where property is transferred for less than an adequate and full consideration in money or money's worth, then the amount by which the value of the property exceeded the value of the consideration constitutes a gift within the meaning of the statute. If the consideration is not reducible to a money value, as in the case of love and affection, promise of marriage, etc., it is to be wholly disregarded, and the entire value of the property transferred constitutes the amount of the gift. A sale, exchange, or other transfer of property (see article 2) in the ordinary course of business, where the transaction is bona fide and at arm's length and free

and applying to an unamended or substantially re-enacted statute, are deemed to have received Congressional approval and have the force of law. *Taft* v. *Commissioner*, 304 U. S. 351, 357; *Helvering* v. *Winmill*, 305 U. S. 79, 83; *Douglas* v. *Commissioner*, 322 U. S. 275, 281–282.[6]

The Ninth Circuit Court of Appeals held, in *Commissioner* v. *Greene*, 119 F. 2d 383, 386, certiorari denied, 314 U. S. 641, that "donative intention is immaterial, because § 503 of the act in question does not require it." It is unnecessary, however, for this Court to decide whether or not a donative intent is completely immaterial in all

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from any donative intent, shall be considered as made for an adequate and full consideration in money or money's worth.

In Treasury Regulations 108, Section 86.8, interpreting the same statutory language now found in the Internal Revenue Code, Section 1002, the language of the 1936 edition of Treasury Regulations 79, Article 8, is continued without change.

[6] The reports of the Congressional Committees, recommending adoption of the statute, read as follows (H. Rep. No. 708, 72d Cong., 1st Sess., p. 29 (1939–1 Cum. Bull. (Part 2) 457, 477–478); S. Rep. No. 665, 72d Cong., 1st Sess., p. 41 (1939–1 Cum. Bull. (Part 2) 496, 525)):

> Since the tax is designed to reach all transfers to the extent that they are donative, and to exclude any consideration not reducible to money or money's worth, it is provided in this section that where the transfer is made for less than an adequate and full consideration in money or money's worth, the excess in value of the property transferred over such consideration shall be deemed a gift. For example, if A sells property worth $10,000 to B for $1,000, there is a gift of $9,000.

situations. The Treasury, by the authoritative construction contained in its Regulations already quoted, has excluded "bad bargains" made in the ordinary course of business (Article 8, Treasury Regulations 79):

> However, a sale, exchange, or other transfer of property made in the ordinary course of business (a transaction which is bona fide, at arm's length, and free from any donative intent), will be considered as made for an adequate and full consideration in money or money's worth.

In any event, when a transaction is essentially a family settlement and involves no bargain or *quid pro quo*, the statute and regulations assume a gift and do not require express proof of donative intent. Certainly the regulations do not broaden the statute, if anything they limit it.[1] Indeed, this Court in *Robinette* v. *Helvering*, 318 U. S. 184, 187–188, recently has construed, applied, and by implication approved Article 8, in holding that a family settlement fell without "the permissive scope of Art. 8 of Regulations 79 (1936 edition)", since it did not constitute a transaction "in the ordinary course of business".

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[1] Thus, in II Paul, *Federal Estate and Gift Taxation*, Sec. 16.14, p. 1113, it is stated:

> It is assumed in the regulations that if a transfer is not "made in the ordinary course of business," as defined by the Treasury, the lack of "an adequate and full consideration in money or money's worth" should dispose

The instant case surely involves no arm's length transaction in the ordinary course of business. The context was not commercial at all; it was a family transaction. It involved neither a good nor a bad bargain; it involved no bargain at all. There was no purpose to exact a *quid pro quo;* taxpayer wished to afford his prospective wife and her children assurance of support in the event of his death. This is the typical situation in which the gift tax—bulwark of the estate tax—was meant to apply. Taxpayer desired and Miss Desmare desired for him, unhampered control of his affairs (R. 11) so that he might arrange them readily by equitable division for the benefit of the entire family including his children by former marriages and his grandchildren.[8] Clearly the promise and transfers on one side were not in *payment* for those on the other. With marriage in mind taxpayer consulted his lawyer (R. 44)—

> as to the feasibility of making a prenuptial agreement with Miss Desmare to settle property rights, safeguard against an unequal distribution of his estate and avoid

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of any assertion that the transferor lacked donative intent.

For further discussion of the meaning of the statute and regulations in this connection, see II Paul, *id.* at Sections 16.14–16.15.

[8] The antenuptial agreement was executed in the presence of his married daughter by a former marriage, Doris Merrill Magowan, and probably also his son-in-law (R. 15, 16).

> for all time any possible repetition of such a contest over money matters as he had experienced in connection with the above mentioned divorce proceeding.[9]

Thus taxpayer did not seek a trade with his prospective wife; he was interested in a family settlement and a fair distribution of his estate. The antenuptial agreement is replete with indicia of this purpose and no other. Made the day prior to the marriage (R. 7), it recites the contemplated marriage; the desire of taxpayer to make fair provision for Miss Desmare; her wish to have such provision made for her as a substitute for all rights "to which she may hereafter become entitled, as wife or widow" (R. 10) in his property; that it is proper that he be free to make provision for his children by the former marriages, and that in the absence of agreement he would be hindered by existing dower and other laws "from making equitable distribution" (R. 11) of his property among his children and their children and others "justly" objects of his "bounty"; that the nature of his business, "stock market operations" (R. 11), involves risk of heavy losses and that he wishes to guard against

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[9] Since the antenuptial agreement does not waive Miss Desmare's right to support (R. 16), it is difficult to see how that agreement could serve in the unhappy event of future marital misunderstanding to "avoid for all time any possible * * * contest over money matters". This is significant as an indication that taxpayer's primary aim was to make provision for his wife after his death (see *infra*, pp. 26–27).

any unfortunate consequences which his contemplated marriage and the uncertainties of the future may have upon his will and estate; that the agreement will promote marital tranquillity; and that she (R. 11)—

> desires to presently receive the trust settlement hereinafter mentioned and to be assured of a means of support for herself, should she become the first party's widow, and of some provision for any issue of her contemplated marriage; that she is accordingly desirous of having her property rights as wife and widow fixed at this time or made as certain as is now reasonably possible and has urged the first party to make for her and any child or children of hers the provision hereinafter set forth; * * *.

Moreover, the "solemnization" of the "intended marriage" (R. 12) was expressly stated as consideration for the transfer by taxpayer. In his gift tax return, taxpayer stated that the antenuptial agreement was executed (R. 50)—

> in consideration of the solemnization of the marriage and Mrs. Merrill's promise to release and relinquish her inchoate dower and other marital rights in his property * * *.

But taxpayer no more bargained or traded for Miss Desmare's release of her marital rights than for her agreement to marry him.

The transfer was designed to accomplish a division, within the family unit, of a large estate.

It is significant that the taxpayer himself served as trustee under the *inter vivos* trust, as actually set up after the marriage (R. 17, 22). And the participation of the wife's personal attorney in the process of agreement to the contract and the trust instrument does not cast doubt on the characterization of this transfer as a gift. Such participation is not unusual in transactions involving large property interests since close familiarity of counsel with the problems of each party is often desirable. In *Commissioner* v. *Bristol,* 121 F. 2d 129, 131 (C. C. A. 1st), though the court characterized a similar transfer as a "purely business transaction" since it involved the disposition of large interests in property, the transfer was nevertheless held to be a taxable gift.

Finally, it is to the future principally that the antenuptial agreement looks and to the settlement of taxpayer's estate after death. The agreement plainly provides that it is not intended that the future Mrs. Merrill or her children be deprived of taxpayer's support during coverture (R. 16). The *inter vivos* trust, as well as those created under his will, were expressly set up as "a means of support for herself, should she become" his "widow" (R. 11); the agreement thus concerns principally her support and the support of their children after his death. As the court below said, therefore (R. 72):

> We repeat our conviction that the true view of this transaction is that in consid-

> eration of marriage Merrill made, wisely and rightly, a certain and present provision for his wife in substitution for the uncertain and contingent one given her after his death, at her election, by law. The latter would have been taxable. So is that which was substituted for it.

Situations like those involved in *Lasker* v. *Commissioner,* 138 F. 2d 989 (C. C. A. 7th), and *Jones* v. *Commissioner,* 1 T. C. 1207, are readily distinguishable. There, a husband and wife were taking steps to secure a divorce and the settlement of the wife's right to support and her property claims against him were at issue. While we think that the Regulations were not intended to exclude even that type of transaction, there, the parties were dealing at arm's length, in a sense, and the purpose to trade may have been said to exist. Thus, in the *Jones* case, the Tax Court expressly differentiated antenuptial agreements, such as that here involved, and said (p. 1210):

> There may be some ground for argument that prior to or during marriage, when no divorce is contemplated, the inchoate right of dower which may never be realized is too uncertain and indefinite to be then measured in terms of money. Moreover in those cases the circumstances are frequently such that there may well be a definite donative intent in the transfer. The contract there may be to effect a mere family arrangement. The parties are man-

> ifestly not dealing at arm's length and the purpose to exact a *quid pro quo* may be lacking.

Indeed, in the *Lasker* case, it appears (p. 991) that the court understood that the Commissioner conceded that the transaction in question was made in the ordinary course of business at arm's length within the exception contained in Article 8 of Regulations 79.[10]

Again, *Wemyss* v. *Commissioner* 144 F. 2d 78, No. 629, this Term, recently decided by the Sixth Circuit Court of Appeals and which is to be argued immediately after this case, was expressly differentiated by that court from a case like the one at bar. The court there said (p. 81):

> This case differentiates from those cases in which prospective husbands and wives have entered into prenuptial agreements as to the interest to be acquired by the lady in the property and estate of the gentleman. In these cases the prospective wife was agreeing to surrender only herself to the bonds of matrimony without an accompanying surrender of any property owned by her. She was providing against the exigencies of matrimony by fixing a definite basis for her participation in the property or estate of the man she was about to marry. For example, see *Commissioner of*

[10] As a matter of fact, the Government did not intend such a concession.

> *Internal Revenue* v. *Bristol,* 1 Cir., 121 F. 2d 129.

By contrast, the facts in this case, as already pointed out, are closely analogous to those involved in *Robinette* v. *Helvering,* 318 U. S. 184, where by agreement mother and daughter executed reciprocal trusts and the stepfather made a similar arrangement by will. There taxpayer's contention that this agreement came within the exception of the regulations, as an arm's length transaction in the ordinary course of business, was overruled by this Court.

II

TAXPAYER RECEIVED NO CONSIDERATION REDUCIBLE TO A MONEY VALUE AND ACCORDINGLY THE ENTIRE VALUE OF THE PROPERTY WHICH HE TRANSFERRED IS TAXABLE

Where a transferor receives from a transferee consideration of value for a gift, as has been seen, the statute limits the gift to the difference in value between that given and that received. Section 503, Appendix, *infra,* p. 52. The purpose of this provision and of similar wording in sections of the estate tax law is stated by the Circuit Court of Appeals for the First Circuit in *Commissioner* v. *Bristol,* 121 F. 2d 129, 134—

> to prevent the depletion of the transferor's or decedent's estate, unless a tax was paid on the transfer, by requiring that the trans-

> feror or decedent receive in exchange something of the same money value.

"Consideration", as used in Section 503, the court in the cited case states (p. 133)—

> means that when the transferor gives something away and does not at the same time replace it with money of equal value or some goods or services capable of being evaluated in money, he is deemed to have made a gift within the taxing law.

Thus, the Regulations provide that where "a consideration" is "not reducible to a money value" it is "to be wholly disregarded, and the entire value of the property transferred constitutes the amount of the gift." (Article 8, Appendix, *infra*, p. 54.) Hence, the question arises as to what, if any, consideration reducible to a money value taxpayer received in this transaction. Taxpayer apparently concedes, as he must, that the marriage or the promise thereof did not constitute a consideration reducible to a money value. *Commissioner* v. *Bristol, supra;* Regulations 79, Article 8, Appendix, *infra*, p. 54. The court below, indeed, ruled that this was the only consideration for the taxed transfer, and argued that Miss Desmare offered "herself in marriage, and herself alone" (R. 70); it pointed out that the law of Florida would have given her after marriage, if she survived taxpayer, the right to elect dower in her husband's lands and in his personal estate owned at his death; that by the antenuptial agree-

ment the parties arranged that the marital rights, created not by their convention but by the law, should not come into existence, but another more definite provision be substituted. The court concluded that (R. 70–71):

> For this substituted provision she pays just what she would have paid for the provision made by law—herself in marriage. Merrill receives that and nothing else. It is what moves him to make a provision for her. When the transaction is consummated he has a wife and $300,000 less money. She has the $300,000 (with more to follow) and has given herself.

His estate received nothing to compensate for the depletion caused by the transfer of $300,000. All that happened was that a definite basis for the wife's interest in her husband's estate was fixed.

In any event, the only consideration which taxpayer claims he received, namely, release of her inchoate right to elect dower of one-fourth in his lands owned during coverture and in his personal estate owned at his death,[11] is not reducible to a money value. At the time of his marriage, taxpayer owned personal property in the approximate amount of $5,300,000. In addition, he owned real estate, all in Florida, in the amount of $135,000. (R. 49.) The district court found one-fourth of the taxpayer's net worth of $5,300,000 to be $1,325,000; then deducting the sum of $300,000

[11] Notes 1 and 2 and 10, *supra*, state the Florida law.

agreed to be provided for the wife in the testamentary trust, there remained $1,025,000, which the district court held (R. 57)—

> properly may be said to reflect the amount of the contingent interest which was compromised for cash. By using the actuarial factor .422604 and reducing $1,025,000.00 to present worth, the figure of $433,169.10 is obtained and in my opinion may be fairly said to represent the consideration, in money or money's worth, flowing to Mr. Merrill in exchange for the $300,000.00 transferred by him to the irrevocable trust.

The "actuarial factor" was based upon a mortality table with interest at 4%, and represented merely the present net worth of a reversion belonging to a person thirty-five years of age in a fund payable upon the death of a person fifty-three years of age (R. 49–50).[12] This computation

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[12] While reference is made in taxpayer's brief (pp. 17, 27) to the stipulation, already noted, that "this formula and computation is correct, if it is possible to place a money value upon the wife's dower interest under the facts in this case" (*supra*, p. 11), and taxpayer seems to claim that this constitutes an agreement with the Government for "an appropriate valuation formula" (Br. 27) which barred consideration by the court below of the measurement problem, taxpayer's petition for certiorari (p. 4) states that a subsidiary question in the case is

> Whether the marital rights here released were susceptible of appraisal or valuation and were shown to have equaled in value the sum transferred by the husband to the trust.

Moreover, it is quite clear that the stipulation merely amounted to an agreement that the formula was a correct

is founded upon the completely false assumption that the wife's elective interest in taxpayer's estate is contingent only upon her surviving him. The fact is that these marital rights are also subject to numerous other contingencies which the formula used completely disregards. The dower in the personal property applies only to that owned by the husband at the time of his death. Taxpayer's life expectancy was eighteen or nineteen years (R. 71); except for the power of testamentary disposition (R. 72), he had complete dominion over his personalty as long as he lived. Without his wife's consent or contrary to her wishes, he could waste it or give it away, subject to no control whatever and guided solely, if he chose, by mere caprice (R. 71–72). *Smith v. Hines*, 10 Fla. 258.[13]

Moreover, taxpayer might lose his property, and he and his wife expressly recognized the risk of serious financial reverses as being real and in-

means of calculating the value of the wife's reversionary interest if only the calculable contingency—her life expectancy—is taken into consideration. In no sense was the stipulation an agreement that the marital rights were reducible to a money value: i. e., that "it is possible to place a money value upon the wife's dower interest." Indeed this was one of the principal issues considered by both courts below as appears from their opinions (R. 55–57, 71–72).

[13] The dower in the personalty was also conditioned upon taxpayer's retention of his Florida domicile; but the possibility of change has actually materialized and taxpayer is now a resident of New York, not Florida (R. 72).

herent in the nature of his business. As they state in the antenuptial agreement (R. 11)—

> while the personal net worth of the first party now amounts to a very substantial sum, the very nature of his business (investment banking and stock market operations) continuously involves him in contingent risks which may at any time entail heavy losses.

At the time of his marriage taxpayer's real property amounted to $135,000 in value, no more than approximately 27 percent of his estate; there is no evidence that he intended to buy more land and no basis for computation as to any other (R. 71). Applying the formula for which taxpayer contends,[14] the present value of the inchoate dower in the realty is not more than $15,000.[15] Besides, under the amendment to the Florida statute adopted on April 21, 1939,[16] between the marriage date and the settlement of the trust, land as well as personalty is subject to the taxes, debts, and administrative expenses of the husband's estate at the time of his death (R. 72). Similarly, the marital rights both in personalty and realty are subject to additional curtailment by legislation, creating a further contingency. *Randall* v. *Kreiger*, 23 Wall. 137; *Ferry* v. *Spokane, P. & S. Ry. Co.*, 258 U. S. 314.

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[14] $135,000 divided by 4 is $33,750 × .422604 equals $14,262.88.

[15] Laws of Florida (1939), c. 18929, p. 16.

Yet for none of these possibilities does taxpayer make allowance; and indeed by reason of their inherent nature none are capable of actuarial measurement. A similar formula was held fallacious, as applied to valuation of marital rights in personalty under the identical statute, by the First Circuit Court of Appeals in *Commissioner* v. *Bristol*, 121 F. 2d 129, 134. Such rights during the husband's lifetime, the court ruled, are not property at all but a mere expectancy, quite incapable of valuation. In parallel situations this has long been the law applied by the federal courts. In *Robinette* v. *Helvering*, 318 U. S. 184, taxpayer sought to deduct from the total value of a gift the value of his reversionary interest. This Court contrasted the facts in the *Robinette* case with those in *Smith* v. *Shaughnessy*, 318 U. S. 176, decided at the same time, where the reversionary interest depended only upon taxpayer surviving his wife and where, as the Government conceded, the value was capable of ascertainment by recognized actuarial methods. In the *Robinette* case, however, the reversionary interest was conditioned not only upon survivorship, but also upon the death of the life tenant without issue who should reach the age of twenty-one years. In language apposite to the instant case, this Court said (pp. 188–189):

> Factors to be considered in fixing the value of this contingent reservation as of the date of the gift would have included con-

> sideration of whether or not the daughter would marry; whether she would have children; whether they would reach the age of 21; etc. Actuarial science may have made great strides in appraising the value of that which seems to be unappraisable, but we have no reason to believe from this record that even the actuarial art could do more than guess at the value here in question. *Humes* v. *United States*, 276 U. S. 487, 494.

To attempt calculation of the wife's contingent interest in her husband's realty and personalty would, as in *Humes* v. *United States*, 276 U. S. 487, 494, be "mere speculation bearing the delusive appearance of accuracy". In *Commissioner* v. *Marshall*, 125 F. 2d 943 (C. C. A. 2d), Judge Frank, speaking for the court, pointed out the distinction between a case, where the only contingency is survivorship, measurable by recognized mortality tables based upon experience of many lives, and a case such as that at bar, where an additional incalculable contingency—human volition, among others,—is involved. He observed that where the donor has reserved the power of altering trusts (pp. 946–947)—

> so that the actual enjoyment or non-enjoyment of the remainders depended on the donor's decision; in such a case there would be no feasible measure of the "value" of the remainders, for there are no tables or other means for even roughly measuring the whims or fancies of such a donor.

Here the bulk of the property subject to the marital rights is completely dependent upon taxpayer's wishes or whims during his lifetime; its actual value cannot be calculated. The real estate is a more stable factor but nevertheless incalculable since it may be consumed by the husband's debts outstanding at his death.

Where decedent's will permitted invasion of the corpus of the trust for the comfort and happiness of his widow, a life beneficiary, and enjoined the trustee to be liberal in the matter, this Court in *Merchants National Bank* v. *Commissioner*, 320 U. S. 256, has recently held that the value of remainders left for charitable uses could not be computed, since the purposes for which the widow might wish to have the funds spent did not lend themselves to reliable prediction. *A fortiori* is that true here, where no mere right of invasion of the corpus of a trust is involved, but complete dominion by taxpayer except as to his power of testamentary disposition. To the same effect as the *Merchants National Bank* case are *Gammons* v. *Hassett*, 121 F. 2d 229 (C. C. A. 1st), certiorari denied, 314 U. S. 673; *Helvering* v. *Blair*, 121 F. 2d 945 (C. C. A. 2d); *United States* v. *Frank*, 133 F. 2d 1009 (C. C. A. 7th); *First Trust Co. of St. Paul State Bank* v. *Reynolds*, 137 F. 2d 518 (C. C. A. 8th).

In the instant case, as in those cases, the court has not shirked its duty, nor avoided a problem of valuation because of complexity. The

difficulty here is that taxpayer has not proved the nature and extent of the property which he seeks to have valued; on the contrary, he cannot prove its value; the future, now unpredictable, must define it. In order to calculate the value of such an interest, we must have some actuarial basis for the probability that taxpayer during his life expectancy of eighteen or nineteen years, will not give away his estate, will not lose it, will not subject it to debts, and that the legislature will not substantially curtail or destroy the dower rights. Obviously nothing of this kind is in the record in this case, nor, in the nature of things, can it be compiled. Compare *Helvering* v. *Blair*, *supra*, pp. 947–948.

The intangible benefits which, the dissenting opinion suggests, "flowed to him rather than his estate" (R. 76) cannot constitute money consideration. These are said to include (R. 77):

> (a) the right to transact his business without any veto power on the part of his wife; (b) lessening of the possibility of friction between him, his wife, and her stepchildren; (c) and by this financial arrangement eliminating the most frequent menace to conjugal and family congeniality.

Items (b) and (c) are no more reducible to money value than are considerations of marriage or love and affection—though these also often promise economic advantage. Indeed, the antenuptial agreement did not insure against the third wife demanding alimony as had the second, for

her right and the right of her children to claim support were not released (R. 16). As to item (a), his business involved securities[16]—personalty; the antenuptial agreement did not add to his freedom in the conduct of that business.

Finally, this is an action to recover a refund of taxes; taxpayer must establish not merely that the determination of the Commissioner was erroneous, but must prove affirmatively the correct amount of the judgment to which he claims to be entitled. *Helvering* v. *Taylor*, 293 U. S. 507, 514; *Forbes* v. *Hassett*, 124 F. 2d 925, 928 (C. C. A. 1st). This burden he has not and cannot sustain, since the consideration for which he claims credit, in the nature of things, is not reducible to money terms. The consideration received must be wholly disregarded and the entire value of the property transferred assessed as a taxable gift.

III

RELEASE OF DOWER OR STATUTORY MARITAL RIGHTS CREATED IN LIEU OF DOWER CANNOT, AS A MATTER OF LAW, CONSTITUTE "ADEQUATE AND FULL CONSIDERATION IN MONEY OR MONEY'S WORTH" TO ANY EXTENT, WITHIN THE MEANING OF SECTION 503 OF THE REVENUE ACT OF 1932

The concept of "consideration" contained in the gift tax provisions is the result of a process of

[16] As already stated, the principal part of his real estate was used as a residence (R. 7), and his real property ownings as a whole constituted less than 3/100 of his estate.

development which can be traced back at least as far as the earliest modern federal estate tax. However, at all times, the design appears plain: to exclude from its import release of dower or similar marital property rights coming into enjoyment after death. We contend moreover, that Congress intended "adequate and full consideration" to have the identical significance in the estate and gift taxes at all times. In a case presenting essentially the same situation as that which is here involved, the Circuit Court of Appeals for the First Circuit has so held (*Commissioner* v. *Bristol*, 121 F. 2d 129, 134–136), and in language often quoted, this Court has said (*Estate of Sanford* v. *Commissioner*, 308 U. S. 39, 44):

> The gift tax was supplementary to the estate tax. The two are in *pari materia* and must be construed together. *Burnet* v. *Guggenheim*, supra, 286. An important, if not the main, purpose of the gift tax was to prevent or compensate for avoidance of death taxes by taxing the gifts of property *inter vivos* which, but for the gifts, would be subject in its original or converted form to the tax laid upon transfers at death.

If "consideration" is afforded a narrower meaning in the gift tax than in the estate tax, this design is frustrated and ready opportunity is afforded for avoidance of the estate tax.

From the inception of federal estate taxation Congress has been concerned with *inter vivos* transfers which might have the effect of avoiding

the tax, and in the first modern estate tax law provided for inclusion in the gross estate of the decedent transfers in contemplation of or intended to take effect in possession or enjoyment at death, excepting, however, in language here significant, "a bona fide sale for a fair consideration in money or money's worth". Sec. 202 (b), Revenue Act of 1916, c. 463, 39 Stat. 756.

Again, from the inception of this tax, Congress regarded dower and similar marital property rights in the same category as other property of the decedent. Dower rights were treated as mere expectations and not the property of the spouse during the lifetime of the husband, and Congress intended that such interests should be included in the gross estate of the decedent. The insertion of an express provision to that effect, in Section 402 (b) of the Revenue Act of 1918, c. 18, 40 Stat. 1057, was understood to be declaratory of the existing law.[17] The Ways and Means Committee stated that the distinction between dower and property passing to the wife by will or intestate succession is technical rather than real, at least so far as inclusion for purposes of the estate tax is concerned, and that the Treasury Department had been correct in ruling that it

[17] Sec. 402 (b) provided as follows:

To the extent of any interest therein of the surviving spouse, existing at the time of the decedent's death as dower, curtesy, or by virtue of a statute creating an estate in lieu of dower or curtesy:

should be included in the gross estate under the 1916 Act.[7] The language of the amendment has remained unchanged in all subsequent Acts.

It was not until the Revenue Act of 1924 that Congress limited deductible claims to those supported by consideration. The same standard was used as had been applied to transfers in contemplation of death, namely, "claims contracted bona fide and for a fair consideration in money or money's worth" (Section 303 (a) (1) of the Revenue Act of 1924, c. 234, 43 Stat. 253) for, as the Committee Reports state, "On principle the same limitation should be applied here, and

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[7] H. Rep. No. 767, 65th Cong., 2d Sess., p. 21 (1939-1 Cum. Bull. (Part 2) 86, 101):

> Section 402 of this bill, which takes the places of section 202 of the original act, has been revised so as to contain a provision specifically including in the gross estate dower, curtesy, or any estate created in lieu of dower or curtesy. The distinction between dower and curtesy interest and property passing to wife or husband by will or intestate succession is technical rather than real, at least in the consideration of the question as to whether they should be subject to estate tax. The proposed amendment is for the purpose of making it clear that such interests are to be included.
>
> It was the intention of the framers of the original act that dower, curtesy, and estates created in lieu of dower or curtesy should be included in the gross estate, and your committee believes that the Treasury Department has correctly ruled in requiring them to be so included. Since a dispute has arisen with reference to this question, your committee deems it advisable to provide specifically that these estates shall be included in the gross estate.

the proposed amendment is designed to effect this result."[19] Subsequent sections of the same statute enacted the first gift tax, and with manifest logic, for the peril to be avoided with respect to each tax and the problems to be solved were identical, repeated the precise language evolved in the development of the estate tax.[20]

In the Revenue Act of 1926, this language underwent significant alteration. Prior thereto, the Third Circuit Court of Appeals had decided in *Ferguson* v. *Dickson*, 300 Fed. 961, certiorari denied, 266 U. S. 628, construing the Revenue Act of 1918, that a transfer by a husband to a wife, pursuant to an antenuptial agreement wherein she had released her dower rights, was a sale for "a fair consideration", and accordingly did not constitute a transfer in contemplation of death. In so holding, the court distinguished (p. 964) between "fair" consideration on the one hand and "adequate" or "full" consideration on the

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[19] H. Rep. No. 179, 68th Cong., 1st Sess., pp. 28, 66 (1939–1 Cum. Bull. (Part 2) 241, 261; S. Rep. No. 398, 68th Cong., 1st Sess., p. 35 (1939–1 Cum. Bull. (Part 2) 266, 290).

[20] Revenue Act of 1924, Sec. 320:

* * * * *

Where property is sold or exchanged for less than a fair consideration in money or money's worth, then the amount by which the fair market value of the property exceeded the consideration received shall, for the purpose of the tax imposed by section 319, be deemed a gift, and shall be included in computing the amount of gifts made during the calendar year.

other,[21] pointing out that the Act of 1864 had used the term "adequate consideration." Precisely the same approach was taken by this Court in *Taft* v. *Commissioner*, 304 U. S. 351, 356. It was there pointed out, with reference to the *Dickson* case that:

> The Act of 1924 altered existing law and authorized the deduction of claims against an estate only to the extent that they were "incurred or contracted bona fide and for a fair consideration in money or money's worth." Congress had reason to think that the phrase "fair consideration" would be held to comprehend an instance of a promise which was honest, reasonable, and free from suspicion whether or not the consideration for it was, strictly speaking, adequate. The words "adequate and full consideration" were substituted by § 303 (a) (1) of the Act of 1926. There must have been some reason for these successive changes. It seems evident that the purpose was to narrow the class of deductible claims, and we are not at liberty to ignore this purpose.

In the Revenue Act of 1926, this language—"for an adequate and full consideration in money or money's worth"—was substituted throughout the

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[21] In accord with this holding are *McCaughn* v. *Carver*, 19 F. 2d 126 (C. C. A. 3d); and *Stubblefield* v. *United States*, 6 F. Supp. 440 (C. Cls.), construing the words "fair consideration" contained in the earlier Acts.

various provisions of the estate tax in place of the former "for a fair consideration in money or money's worth".[22]

While the Revenue Act of 1926 did not reenact a gift tax, the Revenue Act of 1932 enacted the gift tax provisions here under construction. Section 503 of this statute repeated the language contained in the estate tax provisions of the Revenue Act of 1926 and included as gifts transfers made for less than "an adequate and full consideration in money or money's worth". The new gift tax was integrated with the existing and additional estate tax (Section 401 of the Revenue Act of 1932) by allowing credits against the estate tax with respect to gift taxes paid.[23] Title VI, entitled "Estate Tax Amendments", contains the following provision:

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[22] E. g., Sec. 302 (c), (d), (e), (f) and (i); Sec. 303 (a) (1); Sec. 315 (b). Sec. 302 (i), which was new in this Act, is significant as reflecting language later incorporated in Sec. 503 of the Revenue Act of 1932, and reads as follows:

> (i) If any one of the transfers, trusts, interests, rights, or powers, enumerated and described in subdivisions (c), (d), and (f) of this section is made, created, exercised, or relinquished for a consideration in money or money's worth, but is not a bona fide sale for an adequate and full consideration in money or money's worth, there shall be included in the gross estate only the excess of the fair market value at the time of death of the property otherwise to be included on account of such transaction, over the value of the consideration received therefor by the decedent.

[23] Secs. 402, 801, Revenue Act of 1932.

SEC. 804. RELINQUISHMENT OF DOWER, ETC., AS CONSIDERATION.

Section 303 (d) of the Revenue Act of 1926 is amended by adding at the end thereof a new sentence to read as follows:

"For the purposes of this title, a relinquishment or promised relinquishment of dower, curtesy, or of a statutory estate created in lieu of dower or curtesy, or of other marital rights in the decedent's property or estate, shall not be considered to any extent a consideration in money or money's worth'."

This language, it will be noted, closely parallels the provision already quoted, long before incorporated in Section 402 (b) of the Revenue Act of 1918, and continued in the successive Revenue Acts (See Section 302 (b) of the Revenue Act of 1926) expressly including such marital property rights in a decedent's gross estate, *supra*, p. 41. Indeed, Section 804 was enacted as a bolster against "subversion" of the legislative intent, which had already been expressed in those sections including dower in the gross estate, and, like that earlier amendment, is to be regarded as declaratory of existing law.[24] The Fourth Circuit

[24] H. Rep. No. 708, 72d Cong., 1st Sess., p. 47 (1939-1 Cum. Bull. (Part 2) 491); S. Rep. No. 665, 72d Cong., 1st Sess., p. 50 (1939-1 Cum. Bull. (Part 2) 532):

SECTION 804. RELINQUISHMENT OF DOWER, ETC., AS CONSIDERATION. This amendment excludes, in determining "consideration in money or money's worth", the value of a relinquished, or a promised relinquishment of,

Court of Appeals so held in *Empire Trust Co.* v. *Commissioner*, 94 F. 2d 307, 309–310. Accord: *Sheets* v. *Commissioner*, 95 F. 2d 727, 730 (C. C. A. 8th).

Thus, without the amendment contained in Section 804, the words "adequate and full consideration" contained in Section 503 of the Revenue Act of 1932, here under construction, must be regarded as designed in the case of the gift tax, as they were in the case of the estate tax, to exclude release of dower.[25] The change from the wording

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dower, curtesy, or other marital rights in decedent's property. Section 302 (a) and (b) of the 1926 Act require the value of such an interest to be included in the gross estate, and, if its value may, in whole or in part, constitute a consideration for an otherwise taxable transfer (as has been held to be so), or an otherwise unallowable deduction from the gross estate, the effect produced amounts to a subversion of the legislative intent expressed in section 302 (a) and (b).

For example, a decedent dies leaving an estate of $1,500,000 (after payment of all charges), and under the State law the surviving spouse is entitled to one-third, or $500,000, of which she can not be deprived by will without her consent. Under existing law, the estate is entitled to no deduction on account of her statutory rights, but, if she and decedent had entered into a contract by which she was to receive from his estate a stated sum in consideration of a waiver of her statutory rights, the amount due her under the contract might be held a deductible claim against the estate as having been contracted for an adequate and full consideration in money's worth, namely, the value of her waived marital rights.

[25] Release of inchoate dower may well be understood as one of the considerations not reducible to money value included in the following sentence of Regulations 79, Article 8:

of the 1924 Act is sufficient to avoid the construction of "fair" consideration in *Ferguson* v. *Dickson, supra*. As the court said in the *Bristol* case, referring to *Empire Trust Co.* v. *Commissioner, supra* (p. 135):

> The only case in point, therefore, holds that under the estate tax provisions of the Revenue Act of 1926 release of dower cannot be regarded as "adequate and full consideration in money or money's worth"; in fact, cannot be regarded as consideration at all, for the court allowed no deduction from the gross estate. The phraseology of the

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A consideration not reducible to a money value, as love and affection, promise of marriage, etc., is to be wholly disregarded, and the entire value of the property transferred constitutes the amount of the gift.

Indeed, the section of the Oregon Gift Tax Act (Laws of Oregon (1933), c. 427, Sec. 3, p. 730) identical with Section 503 of the Revenue Act of 1932, is so expressly construed in the regulations and instructions issued by the Oregon taxing authorities. The form of the Oregon Regulation is substantially the same as Treasury Regulations 79, Article 8 (1934 edition, quoted in footnote 5, *supra*, p. 20), with this interesting addition which so far as pertinent, reads:

Oregon Regulations and Instructions to Gift Tax Act [3 C. C. H., State, Inheritance, Estate and Gift Tax Service, 7th ed., p. 49,234].

> ART. 7. *Gross Gifts Made During Calendar Year for Which This Return Is Filed; Schedule B.*—
>
> (i) * * * If the consideration is not reducible to a money value as in the case of love and affection, promise of marriage, *release of inchoate right of dower*, etc., it is to be wholly disregarded and the entire value of the property transferred constitutes the amount of the gift. * * * (Italics supplied.)

gift tax, enacted in 1932, is precisely the same, and it therefore seems a fair assumption that the consideration requisite under the two taxes is identical. Since release of dower does not meet the requirements of the estate tax, it does not meet the standards required by the identical words of the gift tax.

Moreover, another important purpose of the gift tax has been to supplement the income tax by discouraging the division of large estates among members of a family, thereby avoiding surtaxes.[28] If release of inchoate dower is regarded as consideration within the meaning of the gift tax, the usefulness of the gift tax for this purpose will be seriously curtailed under the very circumstances in which the division of estates to avoid surtaxes is most likely and practical.

In any event, even if taxpayer is correct in contending that the 1932 amendment to the estate tax resulted in an actual change in the treatment of dower as consideration for estate tax purposes, the allegedly new construction should be applied to the gift tax. To adopt the language of the court in the *Bristol* case (p. 136):

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[28] *Smith* v. *Shaughnessy*, 318 U. S. 176, 179, note 1; *Commissioner* v. *Bristol*, 121 F. 2d 129, 136; H. Rep. No. 708, 72d Cong., 1st Sess., p. 28 (1939–1 Cum. Bull. (Part 2) 477); S. Rep. No. 665, 72d Cong., 1st Sess., p. 40 (1939–1 Cum. Bull. (Part 2) 525). Gifts under a marriage settlement are excluded from taxable income. Revenue Act of 1938, Sec. 22 (b) (3), and Treasury Regulations 101, Art. 22 (b) (3)–1, Appendix, *infra*, pp. 53, 54.

> Why Congress did not apply § 804 to the gift tax we do not know. It may have been inadvertence; it may have been that Congress felt that correction of the erroneous interpretation of the words in the estate tax would forestall similar erroneous construction of the same words in the newly enacted gift tax. Whatever may have been the reason, we believe that as an original matter, the phrase as used in the gift tax was intended to have a construction similar to that given by § 804; and we do not feel that the mere absence of such an express limitation should prevent that interpretation. The provisions of the revenue act imposing the gift tax have always been interpreted by the courts by reference to the complementary estate tax.

The estate tax, like the gift tax, applies to some completed *inter vivos* transfers. These may be transfers in contemplation of death or those intended to take effect in possession or enjoyment at or after death. Congress could hardly have intended that completed *inter vivos* transfers, some of which would be subject to the estate tax, were not to be taxed as gifts, or that different treatment should be accorded to *inter vivos* transfers which do not fall within the estate tax but are like transfers so taxed. Such an interpretation would lead to a perplexing situation where under identical definitions of consideration in the estate and gift tax contradictory results are reached.

The 1932 estate tax amendment was merely declaratory of the existing law and, in any event, the absence of this amendment from the gift tax provisions is not decisive of the question. In accordance with the policy of integration of the estate and gift taxes, Congress designed the gift tax to be construed with reference to and consistently with the estate tax. While the correlation may not be complete in the sense that Congress may have intended to subject certain transfers to both the gift and estate tax, since the gift tax is a "form of down-payment on the estate tax" (*Smith* v. *Shaughnessy*, 318 U. S. 176, 179), there is no warrant for saying that "consideration" is to be given a different meaning in the gift tax provisions than it has under the estate tax.

CONCLUSION

The decision of the Circuit Court of Appeals is correct and should be affirmed.

Respectfully submitted.

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JANUARY 1945.

APPENDIX

Revenue Act of 1932, c. 209, 47 Stat. 169:

SEC. 501. IMPOSITION OF TAX.

(a) For the calendar year 1932 and each calendar year thereafter a tax, computed as provided in section 502, shall be imposed upon the transfer during such calendar year by any individual * * * of property by gift.

(b) The tax shall apply whether the transfer is in trust or otherwise, whether the gift is direct or indirect, and whether the property is real or personal, tangible or intangible; * * *.

* * * * *

SEC. 503. TRANSFER FOR LESS THAN ADEQUATE AND FULL CONSIDERATION.

Where property is transferred for less than an adequate and full consideration in money or money's worth, then the amount by which the value of the property exceeded the value of the consideration shall, for the purpose of the tax imposed by this title, be deemed a gift, and shall be included in computing the amount of gifts made during the calendar year.

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SEC. 804. RELINQUISHMENT OF DOWER, ETC., AS CONSIDERATION.

Section 303 (d) of the Revenue Act of 1926 is amended by adding at the end thereof a new sentence to read as follows:

"For the purposes of this title, a relinquishment or promised relinquishment of

dower, curtesy, or of a statutory estate created in lieu of dower or curtesy, or of other marital rights in the decedent's property or estate, shall not be considered to any extent a consideration 'in money or money's worth'."

Revenue Act of 1938, c. 289, 52 Stat. 447:

SEC. 22. GROSS INCOME.

* * * * *

(b) *Exclusions from Gross Income.*—The following items shall not be included in gross income and shall be exempt from taxation under this title:

* * * * *

(3) *Gifts, bequests, and devises.*—The value of property acquired by gift, bequest, devise, or inheritance * * *.

* * * * *

Treasury Regulations 79 (1936 ed.):

Article 1. *Imposition of tax.*—* * * The tax is not limited in its imposition to transfers of property without a valuable consideration, which at common law are treated as gifts, but extends to sales and exchanges for less than an adequate and full consideration in money or money's worth. (See article 8.) * * *

Art. 8. *Transfers for a consideration in money or money's worth.*—Transfers reached by the statute are not confined to those only which, being without a valuable consideration, accord with the common law concept of gifts, but embrace as well sales, exchanges, and other dispositions of property for a consideration in money or money's worth to the extent that the value of the property transferred by the donor exceeds the value of the consideration given

therefor. However, a sale, exchange, or other transfer of property made in the ordinary course of business (a transaction which is bona fide, at arm's length, and free from any donative intent), will be considered as made for an adequate and full consideration in money or money's worth. A consideration not reducible to a money value, as love and affection, promise of marriage, etc., is to be wholly disregarded, and the entire value of the property transferred constitutes the amount of the gift.

Treasury Regulations 101, promulgated under the Revenue Act of 1938:

> Art. 22 (b) (3)–1. *Gifts and bequests.* * * * An amount of principal paid under a marriage settlement is a gift. * * *

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